UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CC-1 LIMITED PARTNERSHIP D/B/A COCA COLA PUERTO RICO BOTTLERS Respondent Employer And CARLOS RIVERA, et als. Charging Parties And	Cases No. 24-CA-11018, et al.
UNION DE TRONQUISTAS DE PUERTO RICO, LOCAL 901, INTERNATIONAL BROTHERHOOD OF TEAMSTERS Respondent Union And CARLOS RIVERA et als. Charging Parties And MIGDALIA MAGRIZ, et als. Charging Parties	Cases No. 24-CB-2648, et al. Cases No. 24 CB-2706, et al.

BRIEF IN SUPPORT OF RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

COMES NOW, **CC1 LIMITED PARTNERSHIP D/B/A COCA-COLA PUERTO RICO BOTTLERS,** hereinafter referred to as "CCPRB", through the undersigned attorneys, and pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board ("Board"), files its Brief in Support of Respondent's Exceptions to the April 16, 2010 Decision of Administrative Law Judge Bruce D. Rosenstein ("ALJ").

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I. PRELIMINARY STATEMENT

The main issue in this case revolves around an illegal and unauthorized strike conducted by some of CCPRB's employees on October 20-22, 2008 without the sanction or support of the Union which represents them.[1] The ALJ held that said strike was an unfair labor practice strike protected by the National Labor Relations Act and, consequently, concluded that the discharge of the employees who participated in said illegal and unauthorized strike was an unfair labor practice. As will be discussed below, the October 20-22 strike was not an unfair labor practice strike because, contrary to what the ALJ held, it was not called to protest alleged unfair labor practices by CCPRB. Rather, the intent of the strike was to undermine the Union's bargaining position and grant control of the negotiations of the successor collective bargaining agreement to a different group of employees. In addition, not only was the October 20-22 strike not an unfair labor practice strike, it was also an illegal strike outside the protection of the NLRA inasmuch as it was detrimental to the Union's bargaining position and it was called by a group of employees acting as a labor organization in opposition to the duly certified exclusive bargaining representative.

The strike in question was conducted during October 20-22, 2008 by a group of employees led by five former shop stewards, i.e. Miguel Colón, Francisco Marrero, Félix Rivera, Carlos Rivera and Romián Serrano. (Hereinafter collectively referred to as the "Shop Stewards") The Shop Stewards were discharged after encouraging other bargaining unit employees to abandon their work stations on September 9, 2008 in violation of their obligations under the terms of the collective bargaining agreement and in violation of CCPRB's Rules of Conduct.

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[1] Unión de Tronquistas de Puerto Rico, Local 901, is the exclusive bargaining representative of CCPRB's employees.

The ALJ held that the October 20-22 strike was called to protest the suspension and discharge of the Shop Stewards and to reconvene the parties' successor collective-bargaining negotiations that had ceased on September 9. Therefore, he concluded, the strike was an unfair labor practice strike. The ALJ's conclusion is not supported by the evidence. As will be discussed, contrary to the ALJ's conclusion, the evidence shows that the October 20-22 strike was strategically planned and enforced behind the Union's back by dissenting employees who sought to undermine the Union. The evidence in the record clearly shows that the Shop Stewards, acting as a labor organization representing CCPRB's employees, replaced the Union and took control of the decision making process regarding the October 20-22 strike and the renewal of the collective bargaining agreement negotiations. The Union never authorized the strike. The NLRA grants the certified representative of the employees the right to bargain on behalf of the employees. 29 U.S.C. §151. Consequently, a strike in detriment of the Union's bargaining position and for the purpose of undermining the exclusive bargaining representative is not a protected activity under the NLRA.

Furthermore, inasmuch as the purpose of the strike was to undermine and injure the Union's bargaining position, the October 20-22 was in violation of the NLRA and, thus, outside of its protection. Moreover, the employees who organized, instigated and participated in the strike acted like a labor organization to the detriment of the bargaining unit employees' duly certified exclusive bargaining representative which is also in violation of the NLRA.

II. STATEMENT OF THE CASE

A. The September 9 Work Stoppage

CCPRB and the Union have bargained two collective bargaining agreements. (Tr. 86, ln. 20-25; Tr. 87, ln. 1-2 José Adrián López). The first collective bargaining agreement between CCPRB and the Union had an effective date from July 1, 2003 to July 1, 2008. (Tr. 91, ln 21-22 José Adrián López; Joint Exhibit 1) As part of the negotiations for the successor collective bargaining agreement, the parties agreed to extend the validity of the first collective bargaining agreement retroactively from July 1, 2008 first until July 31, 2008. (Tr. 92, ln. 7-8; Tr. 93, ln. 3-7; Tr. 97, ln. 10-12 José Adrián López; Tr. 777, ln. 13-16 Lourdes Ayala; Joint Exhibit 2)

On September 9, 2008 a bargaining meeting was held between CCPRB and the Union. (ALJD p. 7, ln. 32-33; Tr. 779, ln. 1 Lourdes Ayala; GC Exhibit 3(b)) The Shop Stewards (Miguel Colón, Francisco Marrero, Félix Rivera, Carlos Rivera and Romián Serrano) composed the Union's bargaining committee. Near the end of the September 9 bargaining meeting, López requested permission from Ayala to visit the Cayey plant that night to discuss the status of the negotiations with employees. (ALJD p. 7, ln. 40-41, p.8, ln. 1-2; Tr. 103, ln.14-18, Tr. 105, ln. 16-21, José Adrián López; Tr. 243, ln. 16-19. Miguel Colón; Tr. 781, ln. 24-25, Tr. 782, ln. 1-3; Tr. 822, ln. 21-23 Lourdes Ayala) After the conclusion of the bargaining meeting, Ayala held a telephone conversation with López and told him that he was not authorized to go to the plant. (ALJD p. 8, ln. 7-13) Instead, they agreed to meet at the plant the following day (September 10) at noon to, among other things, coordinate Lopez's meeting with the employees. (ALJD p. 8, ln. 13-16; Tr. 105, ln. 22-25, Tr. 108, ln. 10-13, José Adrián López; Tr. 782, ln. 19-25; Tr. 783, ln. 1-9; Tr. 784, ln. 7-14; Tr. 786, 2-6 Lourdes Ayala)

Despite the above, López went to the Cayey plant on the night of September 9 accompanied by the Shop Stewards. (ALJD p. 8, ln. 36-37; Tr. 109, ln. 9-11, José Adrián López). At the entrance gate of the CCPRB Cayey facility, the security guard specifically informed López that he was not authorized to enter the plant. (ALJD p. 8, ln. 37-39; Tr. 109, ln. 17-24; Tr. 110, 22-25 José Adrián López) López disregarded the security guard's instructions and followed Stewards Félix Rivera and Francisco Marrero into CCPRB's premises. (ALJD p. 8, ln. 40-42; Tr. 112, ln. 6-7, José Adrián López) Once inside, and in presence of the aforementioned Stewards, López was asked to leave by Victor Colón, who was the highest ranking CCPRB officer of the Production Department. (ALJD p. 9, ln. 13-14; Tr. 531, ln. 16-20 Victor Colón; Tr. 869 ln. 24-25; Tr. 870 ln. 1-3, Armando Troche; Tr. 535, ln. 3-7, Víctor Colón; Tr. 440, ln. 15-17, José Rivera Ortiz). An argument ensued during which Colón was insulted and threatened by López and by Stewards Francisco Marrero and Félix Rivera. (Tr. 190, ln. 17-20, José Adrián López; Tr. 538, ln. 9-25; Tr. 539 ln 1-3, Víctor Colón) (Tr. 539, ln. 12-18; Tr. 542, ln. 19-25; Tr. 543, ln. 1-6 Víctor Colón)

After the incident described above, José Adrián López and two of the Shop Stewards gained access from the cafeteria into CCPRB's production, warehouse and dispatching areas. (Tr. 118, ln. 4-6 José Adrián López) López and Stewards Carlos Rivera and Francisco Marrero began shouting "STOP" "STOP" "STOP" to the employees, signaled and gestured them to stop working, and took them outside their working areas. (Tr. 871, ln. 3-25; Tr. 872 ln. 9-17, Armando Troche) Shortly thereafter, Stewards Félix Rivera and Romián Serrano entered through the conventional area where the trucks were being loaded, walked directly towards López, Stewards Carlos Rivera and Francisco Marrero, and also started shouting to the employees in the area, including those in the picking area, "STOP", "STOP"

"STOP" THIS IS FUCKED UP". (Tr. 875, ln. 13-14, 25; Tr. 876, 1-4, 16-22; Tr. 877, ln. 14-25; Tr. 878, ln. 1-19 Armando Troche) At that moment, Stewards Francisco Marrero, Félix Rivera and López circled Víctor Colón and, in a threatening manner, Steward Francisco Marrero pointed at Víctor Colón and told him: "it's good that this is happening to you ... that's why they shot you, bastard" (in reference to a 2001 incident in which Victor Colón was shot while he worked for another employer). (ALJD p. 10, ln. 12-16; Tr. 546, ln. 1-24, Víctor Colón) Victor Colón panicked, left the area and went to his office to wait for the police to arrive. (ALJD p. 10, ln. 16-17;Tr. 546, ln. 15-16; Tr. 547, ln. 2-7; Tr. 548, ln. 16-22 Victor Colón)

That night, Armando Troche, CCPRB's highest ranking officer that night at the Warehouse Department, approached Stewards Francisco Marrero, Félix Rivera, Carlos Rivera and Romián Serrano and asked them why they were taking the employees outside their work areas. He also asked them to please lower their voices, since he felt it was the most prudent thing to do. The only one who replied was Steward Francisco Marrero, who told Armando Troche to "shut up, you asshole, this has nothing to do with you". Based on said response, Armando Troche did not say anything else. (Tr. 882, ln. 1-9, Armando Troche) Steward Romián Serrano went alone to the 2 liter production line area and took the employees out shouting and gesturing to the employees to stop working. (Tr. 869, ln. 22-25, Tr. 870, ln. 1-3, Armando Troche; Tr. 994, ln. 10-11; 21-25; Tr. 995, ln. 1; Tr. 997, ln. 3-10; Tr. 998, ln. 3-10; Tr. 999, ln. 2-7, Marcos Mercado)

Steward Miguel Colón arrived at the plant through the conventional ramp area and immediately started shouting to the employees who were still working near the area to "STOP". (Tr. 883, ln. 25, Armando Troche)

CCPRB's production was stopped for almost 2 hours due to the illegal work stoppage provoked and caused by López and the Shop Stewards. (Tr. 562, ln. 18-24, Víctor Colón)

As the ALJ correctly concluded, the Shop Stewards encouraged the other bargaining unit employees to abandon their work stations and did not instruct them not to leave their work stations or urge them to return to work. (ALJD p. 13, ln. 8-13) These actions violated the terms of the collective bargaining agreement and the Employer's Rules of Conduct. (ALJD p. 13, ln. 17-22) As a consequence of their actions on the night of September 9, the Shop Stewards were suspended and subsequently discharged.

B. <u>The October 20-22 Strike</u>

On Monday, September 15, the Union held a meeting with the CCPRB employees at the parking lot of Mueblerías Mendoza in Cayey, where they discussed three points that the Union deemed important in trying to solve the issues with CCPRB. (Tr. 136, ln. 25-25, José Adrián López) These points were: (a) the return to the negotiation of the new collective bargaining agreement, (b) the reinstatement of the Shop Stewards, and (c) the agreement of CCPRB not to file charges against the Union for the September 9 incident. (Tr. 136, ln. 19-25, José Adrián López; Tr. 249, ln. 7-15, Miguel Colón)

The bargaining unit employees agreed that if the referenced issues were not successfully resolved, a strike vote would be approved. (Tr. 136, ln. 25, Tr. 137, ln. 1, José Adrián López) Thus, a strike vote would only be implemented if the Union was unable to reach an agreement with CCPRB on the three specific issues. The Union then took steps to attempt to resolve the referenced issues. On September 16, the Union, as the exclusive bargaining representative of the CCPRB employees, filed

a grievance on behalf of the Stewards. (Joint Exh. 12). In addition, CCPRB and the Union were in the process of resuming the collective bargaining negotiations. (Joint Exhibit 16 and 17) The Union summoned an assembly with its members in order to choose a new bargaining committee, and CCPRB and the Union started the process of coordinating the next bargaining session. (Tr. 343, ln. 22-24 Alexis Hernández Santana)

The Union´s internal rules require it to follow several procedures before engaging in any strike activity. Under the Union's constitution, prior to becoming involved in a strike, the Union has to notify the International's Joint Council of the contemplated action and the nature of the difficulty. (R.U. Exh. 8, Art. XII-Section 4) On September 16, the Union filed a request for strike funds with Teamsters Headquarters. (Tr. 232, ln. 3-4, José Adrián López; CP-24-CB-2706 Exh. 1)The petition for the approval of disbursement of strike funds only identified "all the economic articles" of the collective bargaining agreement as the nature of the difficulty for engaging in a strike against CCPRB. (CP 24-CB-2706 Exh. 1) The petition for approval of disbursement of strike funds—co-signed by López—did not mention the suspension and/or termination of the Shop Stewards as "the nature of the difficulty" for engaging in a strike. (CP 24-CB-2706 Exh. 1).

From September 16 to October 6 the Union did not call a strike at CCPRB. (Tr. 233, ln. 23-25; Tr. 234, ln. 1-2, José Adrián López) On October 3, the Union held an internal election to fill the positions of President, Vice-President, and three trustee positions. (ALJD p. 15, ln. 44-45) The slate supported by López and CCPRB employees lost that election. (Respondent Union Exhibit 6; GC Exhibit 34, paragraph 22) By letter dated October 6, the Union terminated López from his position as a Business Representative. (ALJD p. 15, ln. 49-52)

On October 9, the Union summoned the employees to an assembly to be held on October 12. (Tr. 283, ln. 3-16 Miguel Colón) The purpose of that assembly was to appoint the new CCPRB employee members of the bargaining committee that would substitute the suspended Stewards in order to resume negotiations of the successor agreement. (Tr. 343, ln. 22-24 Alexis Hernández Santana)

On that same date, the Shop Stewards distributed flyers in front of the CCPRB Cayey Plant calling an assembly of their own to be held on October 13. (Tr. 273, ln. 19-22 Miguel Colón) In the midst of their distribution, the Shop Stewards learned that the Union was calling for an assembly to be held on October 12 for the appointment of their substitutes in the bargaining committee. (Tr. 283, ln. 4-16, Tr. 292, ln. 15-18 Miguel Colón) The date of the Shop Steward's assembly was then changed from October 13 to October 12, in direct conflict with the Union's assembly. (Tr. 293, ln. 18-25, Tr. 294, ln. 1-4 Miguel Colón). At this time, Union Representative Angel Vázquez approached the Shop Stewards and pleaded with them not to instigate the unit members to boycott the Union's assembly and asked them not to divide the Union membership. (Tr. 273, 23-25, Tr. 274, ln. 15-17, Tr. 285, ln. 13-25, Tr. 286, ln.1 Miguel Colón). The Shop Stewards responded that the members would choose which assembly they wanted to attend. (Tr. 274, ln. 15-17 Miguel Colón)

Consequently, two assemblies were held on October 12: one summoned by the Union and one called by the so called "Committee".[2] (Tr. 273, ln. 19, 22, Tr. 283, ln. 3-16 Miguel Colón) No Union officer was present during the Shop Stewards' October 12 assembly with CCPRB's employees at the parking lot of Mueblerías Mendoza in Cayey. (Tr. 253, ln. 17-19 Miguel Colón). On the other hand, all of the Shop Stewards were present at their assembly, which was conducted by Steward

[2] The so-called "Committee" was composed of the five Shop Stewards.

Carlos Rivera. (Tr. 254, ln. 3-12 Miguel Colón). During this assembly, several bargaining unit employees, including ALL of the Shop Stewards, signed a pre-drafted document (GC Exh. 29(b)) by which they informed the Union that they wanted "the solution of the collective bargaining agreement" through the Shop Stewards. (GC Exh. 29(b)) Additionally, through such document, the attending employees requested that the Union implement a strike vote. (GC Exh. 29 (b))

The document signed at the Shop Stewards' October 12 assembly was faxed to the Union's office on October 14, but the Union did not respond and the Shop Stewards did not try to elicit a response from the Union after faxing the document. (Tr. 256, ln. 16-25, Miguel Colón; *See*, also, GC Exh. 34 Paragraph 24, referring to GC Exh. 29; GC Exh. 29(b); Tr. 257, ln. 1-8 Miguel Colón) The Union did not implement the strike vote after receiving the document faxed by Steward Miguel Colón.[3] (G.C. Exh. 29(b); Tr. 257, ln. 5-8, Miguel Colón)

Meanwhile, the negotiations between CCPRB and the Union were about to resume. During meetings held by CCPRB with its employees on October 13, CCPRB informed them that it was willing to resume negotiations, upon the Union's request. (Tr. 322, ln. 3-7 Héctor Sánchez). However, during the October 13 CCPRB employee meeting, the employees directly expressed to CCPRB's management that they wanted the Shop Stewards and not the union appointees to bargain on their behalf with CCPRB. (Tr. 323, ln. 22-25, Tr. 324, ln. 1, Héctor Sánchez) On October 15, the Union formally requested in writing that CCPRB

[3] It should be noted that the Union's bylaws and constitution provide that "[n]o officer or member of [the] Union or any subordinate body shall call for a strike, stop the work, or initiate a slowdown, or shall urge or intent to urge other members of this Union to do so, without obtaining prior approval of the Executive Board." The "Executive Board and/or Executive Officers of the Union are the Local's President, Vice-President, Recording Secretary, Secretary-Treasurer and Three Trustees (R.U. Exh. 9, Article XXX – Authorization for Strike; Art. VI and Art. VII) None of the shop Stewards occupied such positions within the Union.

resume negotiations (Joint Exh. 16), and CCPRB promptly acquiesced (Joint Exh. 17).

By October 16, CCPRB employees were aware that CCPRB and the Union were about to resume the negotiations. CCPRB informed the employees by posting on the Cayey plant bulletin boards all the communications between the Union and CCPRB concerning the status of the negotiations. (Tr. 322, ln. 3-7 Héctor Sánchez; Tr. 957, ln. 18-25, Tr. 958, ln. 1-22 Marlyn Cruz; Joint Exhibits 16 and 17)

Notwithstanding the above, on October 19 the Shop Stewards held a meeting at Steward Miguel Colón's house where the attendees decided to call a strike. (Tr. 429 ln. 1-5 Carlos Rivera[4]) The Union was not invited to the meeting and no Union officer attended. (Tr. 430, ln.7-8 Carlos Rivera) During the October 19 meeting, the Shop Stewards developed the strike strategy and decided to implement the strike the next day without consulting or notifying the Union. (Tr. 421, ln. 8-10 Carlos Rivera) The strike began on October 20. (Tr. 257, ln. 24, Tr. 276, ln. 23-25 Miguel Colón; Tr. 657, ln. 17-21 Carlos Trigueros Quesada)

It is noteworthy that between October 12 and October 20, neither the Union nor the Shop Stewards nor any of its members, apprised CCPRB of their intentions to strike over their demands to have the Shop Stewards reinstated. (Tr. 259, ln. 14-17 Miguel Colón)

During the strike, Steward Miguel Colón used a loudspeaker on several occasions to request CCPRB's management to reinstate the Shop Stewards and to sit and negotiate with them. (Tr. 280, ln. 7-21 Miguel Colón; Tr. 307, ln. 18-21, Héctor Sánchez; Tr. 420, ln. 1-8 Carlos Rivera)

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[4] This Carlos Rivera is not the same Carlos Rivera who was a Steward.

The Union never supported the strike and none of the Union's officers attended the strike. (Joint Exhibit 19[5]; Tr. 349, ln. 16-18 Alexis Hernández Santana; GC Exhibit 34 paragraph 41) In fact, through a letter dated October 20 faxed to CCPRB, the Union specifically informed CCPRB that it disapproved of the strike. (Tr. 661, ln. 19-23 Carlos Trigueros Quesada)

On the first day of the strike, one of CCPRB's security guards distributed copies of the Union's October 20 letter among the striking employees (Joint Exh. 19), whereby the Union specifically disavowed the strike. (Tr. 277, ln. 25, Tr. 278, ln. 1-3, Tr. 278, ln. 11-23 Miguel Colón; Tr. 662, ln. 17-21; Tr. 665, ln. 20-25 Carlos Trigueros Quesada; Tr. 959, ln. 13-25 Marlyn Rose Cruz Santiago, hereinafter Marlyn Cruz; Tr. 1016 ln. 10-25; Tr. 1017 ln. 1-5 Micael Resto) After the Union's October 20 letter was distributed among the striking employees, a number of the strikers abandoned the strike and returned to work. (Tr. 666, ln. 16 Carlos Trigueros Quesada).

By October 22, the last day of the strike, there were only 86 employees supporting the strike. (Tr. 666, ln 19-25 Carlos Trigueros) On October 23, CCPRB discharged 34 and suspended the other 52 illegal strikers. (Tr. 666, ln. 19-25 Carlos Trigueros Quesada) CCPRB discharged the 34 employees who engaged in the October 20-22 strike based on its belief that it was an illegal strike, not approved by the Union as the employees' exclusive bargaining representative. (Tr. 661, ln. 2-6; Carlos Trigueros Quesada) CCPRB decided to suspend, rather than discharge, the other 52 of the illegal strikers for business/operational reasons. (Tr. 660, ln. 7-18; Tr. 666, ln. 22-25 Carlos Trigueros Quesada) The decision to only suspend 52 of the

[5] Joint Exhibit 19 is the Union's letter addressed to CCPRB's legal representatives whereby the Union directly and specifically disavowed the strike.

strikers responded to CCPRB's need of having experienced employees in certain areas. (Tr. 666, ln. 22-25 Carlos Trigueros Quesada)

C. The "Last Chance Agreement"

On October 23, 2008 CCPRB suspended without pay 52 employees for 15 working days while CCPRB assessed the particular facts in each case and the disciplinary measures that would be finally applied. (Stipulation of Exhibits and Facts No. 6; Paragraph 2, Joint Exhibit 7) These employees were notified of the suspension by letter dated October 23, 2008 signed by CCPRB Human Resources Director, Lourdes Ayala. (Stipulation of Exhibits and Facts No. 6) According to this letter, the 15 working days original suspension would have ended on November 13, 2008. (Stipulation of Exhibits and Facts No. 6)

Subsequently, the Union as the exclusive representatives of the 52 suspended employees, requested that CCPRB reconsider the disciplinary measure to be imposed. The Company accepted said request, and bargained with the Union the conditions included and accepted by the parties in the Stipulation and Agreement. Specifically, paragraph 4 of the Stipulation and Agreement" states (Paragraph 4 of the Joint Exhibit 7):

> 4. The Employee has requested through the Union the reconsideration of the disciplinary measures to be imposed, and the Company has accepted said Request, subject to the following conditions:

Pursuant to the terms agreed by the parties, each individual employee and the Union accepted the disciplinary measure for the employee's participation in the October 20-22 strike and CCPRB agreed to reduce the suspension period of the employee. (Paragraph 4 and 4(a) and (b) of the Joint Exhibit 7)

On October 30, 2008, CCPRB contacted each of the 52 suspended employees and informed each of them that he had the opportunity, if he chose to do

so, to return to work before the suspension was over by signing an agreement with CCPRB and the Union. The employee was given an appointment by CCPRB to come to the plant that afternoon to read the agreement and to sign it if he agreed to its terms. (Tr. p. 406, 2-13 Marlyn Cruz)

Fifty two (52) employees individually signed the "Stipulation and Agreement" referred to in the "Third Amended Consolidated Complaint" as the "last chance agreement". (Tr. 405, 3-8 Marlyn Cruz) The terms included in the "Stipulation and Agreement" were bargained by CCPRB and the Union on behalf of the employees as the exclusive bargaining representative of the employees and were then accepted individually by each employee who voluntarily signed it. (Joint Exhibit 7)

The ALJ concluded that the following terms included in the "Stipulation and Agreement" are allegedly prohibited and/or unlawful under the Act:

> Paragraph 4 (b) - The Company is committed to reinstating the Employee once the sanction has been fulfilled and immediately following the signature of this agreement, as long as the Employee makes the commitment not to present any action or claim against the Company or the Union for the facts that led to his/her suspension, including but not limited to the violation of the right to strike, organize, associate, or any other disposition related to Section 301 of the Labor Management Relations Act, or local laws and/or for the lack of adequate representation from the Union, salary unearned and/or non compliance with the Collective Bargaining Agreement. (Emphasis provided)
>
> Paragraph 7 – The Employee agrees that he/she will not testify or offer evidence against the Company or the Union before any court, administrative agency or hearing, or at any local or federal forum, except in the case he/she is subpoenaed to do so by an appropriate court or authority.

None of the employees that signed the "Stipulation and Agreement" filed an unfair labor practice charge objecting to its terms and conditions. Specifically Virginio Correa, Luis Bermúdez, Luis Meléndez and José Rivera Barreto did not make any such claim. (GC Exhibit 1) These four employees were among the 52 employees suspended from employment by letter dated October 23, 2008, who subsequently signed the "Stipulation and Agreement". (Joint Stipulation and Exhibits 6 & 7; Tr.

406, 14-15; Tr. 408, 17-19 Marlyn Cruz; Stipulations of Exhibits and Facts No. 7). They were suspended from October 24 to October 31 and returned to work on November 3, 2008 to the positions they held before the October 20-22 strike (Joint Exhibit 7) (Tr. 409; ln. 3-5; Paragraph 17 of the Third Consolidated Amended Complaint)

These four employees were later discharged for reasons unrelated to the so-called "last chance agreement." Luis Bermúdez was discharged on November 6, 2008. (Paragraph 18(a) of CCPRB Answer to Third Consolidated Amended Complaint). José Rivera Barreto was discharged on November 13, 2008. (Paragraph 19(a) of CCPRB Answer to Third Consolidated Amended Complaint). Virginio Correa was discharged on December 10, 2008. (Paragraph 20(a) of CCPRB Answer to Third Consolidated Amended Complaint). Luis Meléndez was discharged on January 9, 2009. (Paragraph 22(a) of CCPRB Answer to Third Consolidated Amended Complaint).

None of these four employees testified at the Hearing regarding the allegations included in paragraphs 13 and/or 26 of the Third Amended Consolidated Complaint. (Hearing Transcript)

III. QUESTIONS INVOLVED

1. Whether Shop Steward Miguel Colón encouraged other bargaining employees to abandon their work stations during the September 9 work stoppage? (Exceptions 1- 6)

2. Whether Shop Steward Miguel Colón violated the collective bargaining agreement and CCPRB's Rules of Conduct? (Exceptions 1- 6)

3. Whether the October 20-22 strike was an unfair labor practice strike? (Exceptions 7-28)

4. Whether the Shop Stewards acted as a labor organization within the meaning of the Act by calling meetings and/or assemblies to discuss employees' concerns and labor grievance issues with unit employees;

representing CCPRB employees; and promoting and implementing the October 20-22 strike? (Exceptions 7-28)

5. Whether the October 20-22 strike was an illegal strike unprotected by the NLRA? (Exceptions 7-28)

6. Whether the terms of the "Stipulation and Agreement" were prohibited under the Act? (Exceptions 29-32)

7. Whether the General Counsel established a "prima facie" case of discrimination regarding the discharge of Virginio Correa, Luis Bermúdez, Luis Meléndez and José Rivera Barreto? (Exceptions 29-32)

IV. ARGUMENT

A. SHOP STEWARD MIGUEL COLON PARTICIPATED IN THE SEPTEMBER 9 ILLEGAL WORK STOPPAGE, HENCE HIS TERMINATION WAS A FAIR AND LEGAL ONE.

In his decision, the ALJ confirmed the disciplinary actions taken against Shop Stewards Carlos Rivera, Francisco Marrero, Romián Serrano and Félix Rivera for their actions in encouraging the work stoppage of September 9 in violation of Articles 12 and 13 of the collective bargaining agreement, which at said date continued in full force and effect. However, the ALJ did not confirm the disciplinary action taken against Shop Steward Miguel Colon. The ALJ found that Miguel Colón did not participate in the stoppage and did not encourage any employee to participate in the stoppage.

In making this determination, the ALJ disregarded the uncontested testimony of Supervisor Troche. During the hearing, Troche testified that he saw Miguel Colón instigating the employees to leave their work areas. The ALJ rejected this testimony and noted that "Troche did not make this statement in his pre-trial affidavit". (ALJD page 14, lines 6-8) Also, the ALJ concluded that CCPRB manufactured evidence in order to lump together the actions of the four other stewards with those of Colón.

The record does not support these conclusions made by the ALJ. Contrary to the ALJ's statement, Troche did make reference to Miguel Colón's actions in his pre-trial affidavit. Specifically, he stated in his affidavit that "I saw Miguel Colon arrive in the ramp area when the employees where (sic) leaving the ramp area and joined the group at that moment" and "I saw Félix, Romián and Miguel (Colón) between the conventional area, 'picking' and the warehouse area towards the second hallway towards the cafeteria, making gestures to the employees that were still inside to go outside and then they rejoined the group where José Adrián was." (GC Exhibit 14, paragraphs 10 and 12). Thus, the ALJ's determination that Troche did not state in his affidavit that he saw Miguel Colón asking employees to stop working is incorrect. Accordingly, his decision to reject Troche's hearing testimony for that reason is wrong and must be reversed.

Moreover, during the hearing held in this case, Troche contested Miguel Colón's testimony and stated that he saw Miguel Colón participate in the stoppage. (Tr. 883, ln. 17-25 Armando Troche) The General Counsel did not contradict Troche's testimony in any way, even when it had dozens of possible witnesses who could arguably refute Troche's testimony. Troche's testimony was therefore uncontested.

Additionally, the ALJ's conclusion that the employer manufactured evidence in order to lump together Miguel Colón with the other four stewards is completely unsupported by the record. The ALJ failed to point to any evidence allegedly manufactured, simply because there was none. On the contrary, the evidence clearly established that Miguel Colón in fact participated in the illegal work stoppage of September 9.

In light of the above, it is evident that the evidence on the record demonstrated, without evidence to the contrary, that Miguel Colón participated in the work stoppage of September 9, just like the other four Shop Stewards. Accordingly, the ALJ's decision must be reversed. It must be concluded that Miguel Colón's dismissal was lawful and justified.

B. THE OCTOBER 20-22 STRIKE WAS NOT AN UNFAIR LABOR PRACTICE STRIKE BECAUSE ITS PURPOSE WAS NOT TO PROTEST THE DISCHARGE OF THE SHOP STEWARDS OR REQUEST THE RESUMPTION OF THE BARGAINING NEGOTIATIONS.

The ALJ held that the October 20-22 strike was called to protest the suspension and discharge of the Shop Stewards and to reconvene the parties' successor collective-bargaining negotiations that had ceased on September 9. (ALJD page 18, lines 25-29) Therefore, he concluded that the October 20-22 strike was an unfair labor practice strike. (ALJD page 18, line 29) The ALJ's decision is not based on the evidence on the record and, thus, is incorrect. The evidence in this case unquestionably shows that the purpose of the October 20-22 strike was not to protest the discharge of the Shop Stewards and to reconvene the negotiations but rather to undermine the exclusive bargaining representative—the Union—and ultimately replace it.

The NLRA was enacted to establish and enforce workers' rights of self-organization and collective bargaining. The NLRA protects workers' rights to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." However, the concerted activity rights of the NLRA are subject to certain limits. One of these limits involves the exclusivity principle which requires that once a union is certified as the representative of the employees, that union is to act as the exclusive bargaining agent for all workers within the bargaining unit. Applying this

exclusivity principle, the Supreme Court has ruled that when employees act against an established union, those employees are not engaged in protected activity as defined by the NLRA. Emporium Capwell v. Western Addition Community, 420 U.S. 50 (1975). The Court stated that national labor policy "extinguishes the individual employee's power to order his own relations with his employer." Id. at 63.

Extending the protection of Section 7 to the actions of the employees who instigated and participated in the October 20-22 strike undercuts the statutory principle of exclusive representation embodied in Section 9 of the NLRA. The evidence in this case clearly demonstrates that the October 20-22 was the result of the employees' attempt to bypass the Union and bargain directly with the employer. By engaging in the strike, the employees obstructed the ongoing collective bargaining process between CCPRB and the Union as the certified exclusive bargaining representative for the CCPRB employees, a process that had already resulted in CCPRB offering reinstatement to three of the five Stewards and an agreement to return to the bargaining table.[6]

As support for its conclusion that the strike was an unfair labor practice strike, the ALJ found that on September 15, around 130 to 160 bargaining unit employees attended a Union assembly and unanimously authorized a strike unless the employer immediately reinstated the Shop Stewards, reconvened collective bargaining negotiations and agreed not to file unfair labor practice charges against the Union. (ALJD page 18, line 31-37). However, this finding misrepresents the vote held during the assembly and ignores testimony given by Counsel for the General

[6] Between September 11 and September 12, counsel for CCPRB, Miguel Maza, and José Adrián López met at a restaurant to discuss the September 9 incident. (Tr. 131, ln. 19-25; Tr. 132, ln. 1-6 José Adrián López). In said meeting, Maza told López that CCPRB was willing to allow Félix Rivera, Romián Serrano and Miguel Colón to return to work. (Tr. 132, ln. 8-14 José Adrián López)

Counsel's own witnesses, which clearly demonstrate what the employees actually voted for during the September 15 assembly.

The evidence on the record shows that a strike vote would only be authorized if CCPRB did not agree to at least one of three issues discussed during the assembly. The intention of the Union and what they expressed to the employees was to negotiate several issues with management prior to approving a strike vote. (Tr. 136, ln. 25, Tr. 137, ln. 1, Tr. 220, ln. 5-9, Tr. 221, ln. 4-7, Tr. 222, ln. 8-9 Jose Adrian López; Tr. 249, ln. 7-15, Miguel Colón) In particular, the Union stated that it would negotiate three issues: (a) the return to the negotiations of the new collective bargaining agreement, which had ceased following the events of September 9, (b) the reinstatement of the Stewards, and (c) the agreement of CCPRB not to file charges against the Union.

The following testimony of José Adrián López makes it clear that a strike was authorized only if the Union was unable to satisfactorily resolve the referenced issues:

> Q. What, if anything, happened during that meeting?
>
> A. Mr. Francisco Marrero [7] presented a motion, which stated the following, and it was that three things had to take place in order for the situation with Coca-Cola to be solved: the return of the negotiating committee, the no filing of charges against the Union, and their return to the negotiating table; **that if these three conditions did not take place, the striking vote would be approved.**
> (Tr. 136, ln. 19-25 José Adrián López)

Miguel Colon, one of the Shop Stewards, testified that

> It was German Vazquez, the main—the person who was chiefly in charge of addressing that—directing that assembly and he informed everybody there present, the enrollment, of three very important items that in order for him to negotiate with the company again – **that if the company did not agree to at least one of those items,** we would go on strike, and he called for a

[7] One of the Shop Stewards.

striking vote—a vote to strike. (Tr. 248, ln 22-25; Tr. 249. Ln 1-4 Miguel Colón)

It is, therefore, uncontested that the a strike vote would only be approved if the Union was unable to reach an agreement with CCPRB on the three specific issues discussed. (Tr. 136, ln. 19-25, Tr. 137, ln. 1-11 José Adrián López; Tr. 249, ln. 7-15 Miguel Colón).

Moreover, two of the three issues were being negotiated and about to be resolved when the October 20-22 strike took place. First, the issue of the reinstatement of Shop Stewards had been addressed by the Union by filing a grievance on behalf of the suspended Shop Stewards on September 16. (Stipulated Fact No. 12 and Joint Exhibit 12). This grievance was the first step in the bargaining process which was to be used in solving the disputes related to the disciplinary actions taken against the Shop Stewards. As stated, the September 15 vote contemplated that the Union would seek to solve this dispute through negotiation prior to implementing the strike vote. In fact, CCPRB and the Union had already engaged in discussions regarding this issue and CCPRB had already offered to reinstate three of the five Shop Stewards. (Tr. 168, ln. 1-17 José Adrián López).

Furthermore, in their attempt to solve this issue through negotiation prior to implementing the strike, the Union explained to the employees who attended the October 12 assembly that it would take some time for the discharged Shop Stewards to return to CCPRB. Nevertheless, the attending employees continued to defy the Union by refusing to select a new bargaining committee. (Tr. 343, ln. 22-24 Alexis Hernández Santana; Tr. 346, ln. 1-11 CGC's offer of proof regarding the Union's October 12 meeting).

Thus, contrary to what the ALJ found regarding the September 15 assembly, the evidence shows that the Union followed the mandate of said assembly and

sought to seek a peaceful resolution regarding the Shop Stewards' return to work through the grievance and collective bargaining process, before deciding to engage in a strike.

Another issue—the return to the bargaining table—was also being addressed. The evidence shows that CCPRB and the Union were in the process of resuming the collective bargaining negotiations. (Joint Exhibit 16 and 17). During an assembly held on October 12, the Union appointed a new business agent for CCPRB's shop (Joint Exhibit 14) and interim shop stewards (Joint Exhibit 15) in order to continue the bargaining relations. Moreover, CCPRB informed its employees that it was available to resume negotiations of the successor agreement (Tr. 322, ln. 3-7 Hector Sánchez) and accepted a request made in writing by the Union to resume negotiations. (Joint Exhibits 16 and 17) Thus, it is uncontested that the Union and CCPRB were returning to the bargaining table and that the employees were aware of this fact.

The ALJ also held that a petition for strike funds was submitted to the Teamsters' Headquarters on September 16. (ALJD page 15, line 40-42). However, the ALJ failed to find that the petition for strike funds was made because the Union anticipated a stalemate in the negotiation of the economic articles. By failing to make a finding as to this fact, the ALJ implies that the petition for strike funds was submitted because the Union contemplated to strike to protest the disciplinary actions against the Stewards. The ALJ erred in not making a specific finding as to the reasons mentioned by the Union in the petition for strike funds.

As can be easily ascertained from the petition for strike funds, the Union's request to the Teamsters' Headquarters stated that the bargaining negotiations were the reason over which it might engage in a strike action, specifically, **a controversy**

over economic articles. (CP 24-CB-2706 Exh. 1). This document was co-signed by General Counsel's witness José Adrián López, thus, in clear endorsement of its content. (Tr. 232, ln. 3-4 José Adrián López; CP-24-CB-2706 Exh. 1)[8] Accordingly, the Union's request and the Headquarters' approval of any possible strike were based **only** on foreseen difficulties regarding the negotiations of the economic articles, **not the reinstatement of the Stewards**. At the time of the request for Union strike funds, the parties had bargained more than half of the articles of the new labor contract and were close to commencing the negotiations of the economic clauses of the contract. (Tr. 98, ln. 3-5, Tr. 164, ln. 1-5 José Adrián López) The strike funds request evidences that, contrary to ALJ's findings, the Union's reason for requesting a strike vote was in contemplation of a stalemate in the negotiations of the economic articles. If the main source of conflict between the Union and CCPRB was the suspension of the Shop Stewards, it would have been reflected in the Union's strike funds request, and it was not. Therefore, the ALJ erred in not making a specific finding and instead implying that the petition for strike funds supported the contention that the disciplinary actions against the Shop Stewards were the reason for the strike.

Furthermore, although the ALJ acknowledges that on October 3, Local 901 held an internal union election to fill the positions of President, Vice-President and three trustee positions (ALJD p. 15, ln 44-45), the ALJ failed to find that the slate supported by López and the CCPRB employees lost the internal union election. (RU Exh. 6, GC Exh. 34, par. 22). This finding is important because it shows that the employees had an ulterior motive to go on strike behind the Union's back.

[8] CP 24-CB-2706 Exh. 1 is the official Union document required by the Union's Constitution when local unions consider engaging in economic actions. According to the Union's Constitution, "Prior to a local Union becoming involved in a strike, boycott, lawsuit or any serious difficulty, such Local Union shall immediately notify the Joint Council of which it is a member of any contemplated action, setting forth the action contemplated and the nature of the difficulty." RU Exh. 8, Art. XII, Section 4.

Contrary to what the ALJ held, the evidence shows that the vote of September 15 was not to strike to request reinstatement of the Shop Stewards. What the evidence does show is that the strike vote would only be approved if the three issues discussed in the September 15 assembly were not resolved and that already two of those issues were being addressed. Thus, the ALJ erred in holding that the October 20-22 strike's purpose was to protest the discharge of the Shop Stewards and to reconvene the negotiations. The evidence—ignored by the ALJ—shows that this was not an unfair labor practice strike.

C. REGARDLESS OF WHETHER THE OCTOBER 20-22 STRIKE WAS TO PROTEST THE SHOP STEWARDS' DISCHARGE, THE STRIKE WAS CONTRARY TO THE PROVISIONS OF THE NLRA AND FEDERAL LABOR POLICY AND, THUS, ILLEGAL AND UNPROTECTED.

As previously discussed, the exclusivity principle of the NLRA requires that once a union is certified as the representative of the employees, that union is to act as the exclusive bargaining agent for all workers within the bargaining unit. Section 9(a) of the NLRA, 29 USC sec. 159(a). Thus, "when [an] union [is] selected by the employees and recognized by the company as bargaining agent, it [is] understood and agreed on all sides that bargaining with respect to wages, hours and conditions of work would be carried on between the union and the company in accordance with [section 7 of the Act], that the employees would acquiesce in action taken by the union and that they would not undertake independent action with respect to the matters they had committed to it as their authorized agency. Not only did the company agree to bargain with the union, but the employees agreed to bargain only through the union." NLRB v Draper Corporation, 145 F.2d 199, 204-205 (4th Cir. 1944).

In that regard, the courts have clearly stated that:

> The purpose of the act was not to guarantee to employees the right to do as they please but to guarantee to them the right of collective bargaining for the purpose of preserving industrial peace. [...] [T]here can be no effective bargaining if small groups of employees are at liberty to ignore the bargaining agency thus set up, take particular matters into their own hands and deal independently with the employer. NLRB v Draper Corporation, 145 F.2d 199, 203, 205 (4th Cir. 1944); *See also*, NLRB v Sunbeam Lighting Company, Inc., 315 F.2d 661, 662, 663 (7th Cir. 1963)

In the case at hand, because the purpose of the October 20-22 strike was to undermine the duly certified exclusive bargaining representative, in clear contravention of the provisions and policies of the NLRA, the strike is illegal and, therefore, unprotected.

i. **The October 20-22 strike was detrimental to the Union's bargaining position and was instigated by a group of dissenters who sought to replace the exclusive bargaining representative. Therefore, the October 20-22 was illegal and unprotected by the NLRA.**

As previously discussed, and as fully demonstrated by the evidence on record, the Union sought to resolve the disputes that arose out of the September 9 work stoppage by using the channels of collective bargaining. However, the Shop Stewards disagreed and decided to instigate and lead an illegal strike with the sole purpose of undermining the Union and, ultimately, replacing it. This is in clear violation of the principle of exclusive representation embodied in Section 9(a) of the Act.

The Board and Courts have applied the principle of exclusive representation to decide the legality of employee strikes not sanctioned by their exclusive bargaining representative (wildcat strikes). In determining whether these types of strike are protected under the Act, a distinction has been made between strikes that undermine the union's position as exclusive bargaining representative and ones that do not. East Chicago Rehabilitation Center, Inc. v. N.L.R.B., 710 F.2d 397, 402 (7th

Cir. 1983), *citing* R.C. Can Co., 140 N.L.R.B. 588, 595-596 (1963); Sunbeam Lighting Company, 136 N.L.R.B. 1248, 1253-1255 (1962). Strikes called for the purpose of asserting a right to bargain collectively in the union's place **or** which are likely, **regardless of their purpose, to impair the union's performance as exclusive bargaining representative**, are not protected under the Act. *Id.*

As shown by the evidence, the Shop Stewards called for a meeting of the CCPRB employees, without the Union, for October 13. (Tr. 253, ln. 9-14, Tr. 271, ln. 17-25, Tr. 272, ln. 1-7 Miguel Colón). However, the ALJ ignored the evidence and instead found that "on October 9, pursuant to requests by a number of bargaining unit employees to have another assembly, a flyer was prepared by suspended Shop Stewards and distributed to bargaining unit employees announcing a meeting for October 12, to further discuss the three points presented to the employer." (ALJD p. 16, ln. 1-5) This conclusion is unsupported by the evidence. First, the fact that the Shop Stewards' assembly was held at the request of the employees is derived from the self-serving and unreliable testimony of the sole Steward to testify, inasmuch as no bargaining unit employee testified in that respect.

Second, the Shop Stewards' assembly was originally scheduled for October 13 and was later rescheduled for October 12 with the specific intention of creating a direct conflict with an assembly called by the Union for that date. The evidence on the record shows that the Shop Stewards distributed leaflets in front of CCPRB's Cayey plant calling for an assembly on October 13. (Tr. 273, ln. 19-22 Miguel Colón) While doing so, they learned that the Union was calling for an assembly for October 12 to select the Union's new bargaining committee and to discuss the status of the negotiations. (Tr. 283, ln. 4-16, Tr. 292, ln. 15-18 Miguel Colón; Tr. 343, ln. 22-24 Alexis Hernández Santana). The Shop Stewards immediately decided to change the

date of their meeting from the 13th to the same day as that of the Union's assembly, October 12. (Tr. 293, ln. 18-25, Tr. 294, ln. 1-4 Miguel Colón) Notwithstanding the above, the ALJ did not make any finding in this regard.

The ALJ also concluded that on October 9, an officer of Local 901 asked Steward Miguel Colón not to divide the membership by voting to authorize a strike against the Employer. (ALJD p. 16, ln. 5-6). However, the evidence shows that what the "officer of Local 901" asked Colón was quite different. As demonstrated by the testimony presented during the hearing, in response to the Shop Stewards' attempt to meet with the employees, Union representative Angel Vázquez, who was at the Cayey plant giving notice of the Union's October 12 assembly, specifically asked the Shop Stewards not to divide the membership by requiring the employees to forgo the Union's assembly to attend the meeting called by the Shop Stewards.(Tr. 273, ln. 23-25, Tr. 274, ln. 15-17, Tr. 285, ln. 13-25, Tr. 286, ln. 1 Miguel Colón). Moreover, the evidence shows that the Shop Stewards defied the Union's plea to maintain a unified front and responded that the members would have to choose which assembly they would attend. (Tr. 274, ln. 15-17 Miguel Colón).

The Board, Circuit Courts of Appeals and the Supreme Court have all recognized that, in order for the collective-bargaining system to function efficiently, **the union must retain a broad degree of discretion in the negotiation and administration of the bargaining contract.** Electrical Workers (IBEW) v. Foust, 442 U.S. 42, 51 (1971); United Rubber, Cork, Linoleum & Plastic Workers v. N.L.R.B., 368 F.2d 12, 16-17 (5th Cir. 1966). It is the union, not employees, who is entitled to decide how to handle internal union affairs. United Rubber, Cork, Linoleum & Plastic Workers v. N.L.R.B., *supra.* Absent a breach in the union's duty

of fair representation, employees may not act individually or compel the union to act as they deem appropriate. *See:* Vaca v. Sipes, 386 US 171 (1967).

The ALJ stated that "Miguel Colon was informed by one of the Union's attorneys that the only way to have the stewards reinstated was to engage in a strike." (ALJD p. 16, 7-8) This statement is self-serving, uncorroborated and proves nothing. No evidence was submitted to sustain that this was an official Union position or that the lawyer was speaking on behalf of the Union or simply making general conversation. The Union's attorney, Attorney José Carreras, did not testify in this regard. He was present at the hearing and, since he was not the Union's principal attorney for the case, he could have testified.

As to the Shop Stewards' assembly of October 12, the ALJ found that on that date the Shop Stewards held their assembly and the attending employees signed a petition to authorize a strike against the employer unless it immediately reinstated the Shop Stewards, agreed not to file any charges against the Union and reconvened negotiations for a successor collective bargaining agreement. (ALJD p. 16, ln. 12-16) However, the ALJ ignored the evidence and failed to make findings as to several important issues that are necessary to fully understand the reality of what happened before the October 20-22 strike.

The ALJ failed to find, first, that on October 12, two assemblies were held: one called by the Shop Stewards and another one called by the Union. (Tr. 273, ln 19-22; Tr. 283; ln. 3-16 Miguel Colón) Second, the ALJ failed to make a finding as to the fact that no Union officer was present at the Shop Stewards' assembly. (Tr. 253, ln. 17-19 Miguel Colón) Third, the ALJ also failed to find that the petition signed by the employees states that they wanted the negotiations of the CBA to be conducted "through the Stewards". (GC Exh. 29(b)) This is important because it shows that the

strikers wanted to force the Union to use the Shop Stewards as the bargaining committee when it had already decided that it would elect a new committee while they negotiated the reinstatement of the Shop Stewards. Finally, the ALJ failed to find that the Union did not authorize the petition and the Shop Stewards did not try to elicit a response from the Union before deciding to strike. (Tr. 257, ln. 1-4 Miguel Colón)

Regarding the October 12 assembly, what the evidence shows is that the Shop Stewards held their assembly and had the employees sign a pre-drafted document by which they asked the Union to name the Shop Stewards as their bargaining committee to continue the negotiations of the collective bargaining agreement. (G.C. Exh. 29) On October 14, Steward Miguel Colón, in representation of the employees, faxed the Shop Stewards' October 12 assembly document signed by the employees (G.C. Exh. 29 (b)) to the Union. (Tr. 256, ln. 16-25, Miguel Colón; G.C. Exh. 34, Paragraph 24) After faxing the October 12 assembly document to the Union, no Shop Steward tried to elicit a response from the Union concerning said document prior to calling the strike. (Tr. 257, ln. 5-8, Miguel Colón)

These actions (calling for the October 12 assembly; having prepared a document for the signature of the attending employees instructing the Union how to deal with employees' alleged concerns; and faxing the document to the Union in representation of the employees) unquestionably show that the Shop Stewards sought to usurp the Union's role as bargaining representative, effectively replacing themselves for the Union.

On October 19, the Shop Stewards, disregarding the fact that the Union and CCPRB were set to resume the negotiations, met at Steward Miguel Colón's house and decided to hold a strike on October 20. (Tr. 421, ln. 1-10 Carlos Rivera)

Regarding this, the ALJ made the following finding: "On October 19, the five Shop Stewards met at Miguel Colon's house to make final preparations for the strike that would commence at the Employer's facility on October 20." (ALJD p. 16, ln. 26-27) The ALJ failed to find that no member of the Union's Executive Board was present at that meeting. (Tr. 430, ln. 7-8 Carlos Rivera) He also failed to find that the decision to strike on October 20 was made during the October 19 meeting (Tr. 429, ln. 1-5 Carlos Rivera) and that the Union was not consulted regarding the decision to strike.

The ALJ also ignored the fact that neither the Union nor CCPRB knew that a strike would take place on October 20 because the decision was made on October 19, just a few hours before the strike began. The strike took CCPRB by surprise since the Union and CCPRB were coordinating the resumption of the negotiations. At no time had CCPRB been warned of any possibility of a strike, nor had it any reason to expect that a strike would be called, since it was resolving the issues brought by the Union through the process of negotiations. (Tr. 259, ln. 14-17 Miguel Colón)

On October 20, upon being surprised by the strike, CCPRB's representatives asked the Union for an explanation. (Joint Exh. 18) The Union responded to CCPRB's inquiries by means of a detailed written communication whereby it disavowed involvement in calling the strike. (Joint Exh. 19) Additionally, and as to emphasize its point, no Union officer participated in the October 20-22 strike. (Tr. 349, ln. 16-18 Alexis Hernández Santana)

As demonstrated by the evidence on the record, the employees were aware that the Union did not authorize or support the strike. The uncontested evidence shows that (i) the Union was not consulted concerning plans for the strike or the decision to call the October 20 strike, (ii) the Union's letter disavowing the strike was

distributed to the strikers the first day of the strike, (iii) the Union's failure to participate in the strike and the Shop Stewards obvious intention of assuming control of the bargaining unit was evident because no Union officer was invited or was present at the Stewards' meetings on October 12 and 19, (iv) no Union officer was ever present during the strike, and (v) some of the striking employees returned to work upon receiving the Union letter.

The actions preceding the strike, i.e., the Shop Stewards calling for an assembly of the CCPRB employees to discuss their concerns regarding terms and conditions of employment, including the bargaining negotiations status, then intentionally changing the date of the assembly to coincide with the date of the Union's assembly to elect the replacement stewards and, finally, preparing a document for the attending employees to sign seeking to have themselves named as the negotiation committee for the employees, all without notifying the Union and without the attendance of any Union officer, **all prove that the Shop Stewards' and, thus, the employees' true motivation to strike on October 20-22 was both to undermine the Union's authority and to force CCPRB to negotiate with the Shop Stewards**. As further evidence of this motivation, during the meeting with CCPRB management, the employees expressed to CCPRB their desire to have the Stewards, not the Union, bargain on their behalf the pending collective bargaining agreement. (Tr. 323, ln. 22-25, Tr. 324 ln. 1 Héctor Sánchez) Finally, on October 19 the Shop Stewards called yet another meeting with the employees, once more without any of the Union's officers, a meeting at which they strategized the strike and decided to implement it the next day. (Tr. 277, ln. 25, Tr. 278, ln. 1-3, Tr. 278, ln. 11-23 Miguel Colón; Tr. 662, ln. 17-21, Tr. 665, ln. 20-25 Carlos Trigueros Quesada; Tr. 959, ln. 13-25 Marlyn Cruz).

At no time during the strike did the employees request that CCPRB sit and bargain with the Union. At no time during the strike—not even in any of the strike propaganda—was the name of the Union mentioned.[9] Moreover, during the three days of the strike, Stewards Miguel Colón, Carlos "Charlie" Rivera, and others, using a loudspeaker, specifically demanded that CCPRB sit and bargain with the Shop Stewards. (Tr. 419, ln. 8-13; Tr. 420, ln. 1-8 Carlos Rivera; Tr. 280, ln. 7-21 Miguel Colón; Tr. 307, ln. 18-21 Héctor Sánchez).

The ALJ concluded that the employer did not submit any evidence that Miguel Colón or any other bargaining unit employee requested the Employer to negotiate with them. (ALJD p. 19, ln. 39-41) This is incorrect and the ALJ's finding in this regard blatantly ignores the evidence on the record. (Tr. 419, ln. 8-13; Tr. 420, ln. 1-8 Carlos Rivera; Tr. 280, ln. 7-21 Miguel Colón; Tr. 307, ln. 18-21 Héctor Sánchez). There is evidence on the record that unquestionably proves CCPRB's contention that the Shop Stewards requested that CCPRB **negotiate with the Stewards**.

Contrary to the conclusions of the ALJ, the evidence on the record shows that the October 20-22 strike was illegal and, therefore, unprotected by the NLRA. The October 20-22 strike sought to undermine the Union's position and, thus, violated the provisions, principles and policies of the NLRA. In recognizing the importance of the exclusivity principle, the Supreme Court in Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 63 (1975), *quoting* NLRB v Allis-Chalmers Mfgs. Co., 388 U.S. 175, 180 (1967), stated:

> National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the

[9] General Counsel's witness Carlos Rivera testified, in response to questions of the Honorable Judge, that when requesting CCPRB's management to sit and bargain, the request was to sit and bargain with the Union and the stewards. However, on cross-examination, he admitted that none of the employees using the loudspeaker requesting CCPRB to bargain ever expressed such a specific demand. (Tr. 428, ln. 2-4, Carlos Rivera).

> most effective means of bargaining for improvements in wages, hours, and working conditions. **The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees.**
> (Emphasis supplied)

Consequently, as stated by the Board in Energy Coal Partnership, 269 NLRB 770 (1984), "to extend the protection of Section 7 to dissent activity would undermine the statutory system of bargaining through an exclusive representative and **place employers in the position of trying to placate self-designated minority groups, while at the same time attempting to meet the demands of the duly elected bargaining representative.**" (Emphasis added) Accordingly, an employee "in effect pledges when he joins a union that he will exercise some of his Section 7 rights only in accordance with the majority choice of his union." NLRB v Shop Rite Foods, Inc., 430 F.2d 786 (5th Cir.1970).

When a group of employees acts outside the channels of union affairs to protest, even the discharge of a fellow employee, such action "undermines the goals of democracy in the unions and effective labor adjustment through the bargaining process." *Id.* 430 F.2d at 791. Whether a collective bargaining agreement is in effect or not is not determinative, since "[r]elations between employer and collective bargaining agent are especially sensitive when negotiations for a contract are in progress [...]" *Id.* 430 F.2d at 791. The Courts have consistently adhered to the principle of exclusive representation.

The October 20-22 strike was a well-organized plan, created and developed behind the Union's back, with the clear intention of usurping the Union's role as the exclusive representative of CCPRB's employees, and impairing the Union's ability to effectively continue negotiations of the new CBA with replacement stewards. The employees' actions, promoted by the Shop Stewards, placed CCPRB in a position

where it had to continue meeting the Union's bargaining demands or face unfair labor practice charges, and, at the same time, it also had to attend the employees' demands. By disregarding the Union's role and setting themselves up as CCPRB employees' representatives, the Shop Stewards, and employees, literally put CCPRB between a rock and a hard place.

Based on the foregoing, the employees' October 20-22 strike was outside the protection of the Act leaving the striking employees without its protection, and, thus, allowing CCPRB to discharge the illegal strikers.

ii. The Shop Stewards, with their actions regarding the October 20-22 strike, acted as a labor organization. Accordingly, the October 20-22 strike was unlawful since the exclusive bargaining representative of the employees was the Teamsters Union.

The actions of the Shop Stewards previously discussed in instigating, organizing and leading the October 20-22 strike were done with the purpose of forcing CCPRB to bargain with them instead of with the exclusive bargaining representative. The Shop Stewards acted as a labor organization and in so doing violated the NLRA. Thus, the October 20-22 strike was illegal and, therefore, out of the reach of the protections of the NLRA.

Sections 8(b)(4)(i) and (ii)(C) of the NLRA, 29 USC §158, establish that:

It shall be an unfair labor practice for **a labor organization** and its agents-

[...]

> i. to **engage in, or to induce or encourage any individual** employed by any person in commerce or in an industry affecting commerce to engage in, **a strike** or a refusal in the course of his employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials or commodities or to perform any services; or
>
> ii. to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is: [...]

> (C) **forcing or requiring any employer** to **recognize or bargain** with a particular labor organization as the representative of his employees **if another labor organization has been certified as the representative of such employees under the provisions of section 9** [...] (Emphasis added)

The term labor organization is defined in Section 2 (5) of the NLRA, 29 USC § 152, as "**any** organization of **any** kind, or any agency or **employee representation committee or plan**, in which **employees participate and which exists for the purpose,** in whole or in part, **of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.**" (Emphasis added).

The uncontested facts in this case show that the Shop Stewards acted as a labor organization during the relevant period before and during the October 20-22 strike. The record in this case clearly demonstrates that the Shop Stewards acted as an "employee representation committee or plan" for purposes of "dealing with [CCPRB] concerning grievances, labor disputes [...] [and] conditions of work." The uncontested evidence established that after the Union's internal election held on October 3, the Shop Stewards called for meetings with CCPRB employees to discuss the status of the negotiations and the reinstatement of the Shop Stewards, and other terms and conditions of employment, where no Union officer was present. (Tr. 253, ln. 9-14; Tr. 254, ln. 3-7; Tr. 254, ln. 8-12; Tr. 271, ln. 17-25; Tr. 272, ln. 1-7; Tr. 273, ln. 19-22 Miguel Colón; Tr. 429, ln. 22-25, Tr. 421, ln. 4-7 Carlos Rivera) The record further demonstrates that the Shop Stewards succeeded in having the employees view them as their representatives and requested CCPRB to bargain with them. It additionally demonstrates that the Stewards, in representation of the employees, demanded that the Union name them as the negotiating committee for

the CCPRB employees. Ultimately, the Stewards called the October 20-22 strike to force CCPRB to both reinstate them and continue the collective bargaining negotiations with them, **in a clear attempt to bypass and eliminate the Union as the exclusive bargaining representative of CCPRB employees.**

The courts, in recognizing the Act's broad definition of "labor organization", have stated that the term "labor organization" requires only an 'organization' that exists for the purpose, in whole or in part, of dealing with employers concerning specified matters" NLRB v. Sweetwater Hosp. Ass'n, 604 F.2d 454, 451 n. 5 (6th Cir. 1979), NLRB v. Cabot Carbon Co., 360 US 203, 210-211 (1959). "The complete absence of by-laws or a formal structure is irrelevant." NLRB v. Sweetwater Hosp. Ass'n, *supra*. "The fact that there [is] no formal organization, by-laws, officers or dues is immaterial in determining whether it is a labor organization. [The] court has held that such **loosely formed committees do constitute labor organizations within the meaning of the Act.**" Pacemaker Corp. v. NLRB, 260 F.2d 880, 883 (7th Cir. 1958). (Emphasis added). See also, Indiana Metal Products Company v. NLRB, 202 F.2d 613, 621 (7th Cir. 1953); NLRB v. American Furnace Co., 158 F.2d 376, 378 (7th Cir. 1946). Additionally, it has been noted that the broad construction of labor organization applies not only with regard to the "absence of formal organization, [but also to] the type of interchange between parties which may be deemed 'dealing' with employers." Electromation, Inc. v. NLRB, 35 F.3d 1148 (7th Cir. 1994); NLRB v. Ampex Corp. 442 F.2d 82, 84 (7th Cir. 1971), cert. denied, 404 US 939 (1971). Moreover, an organization may satisfy the statutory requirement that it exists for the purpose in whole or in part of dealing with employers even if it has not engaged in actual bargaining or concluded a bargaining agreement. Electromation, Inc., *supra*; NLRB v. Cabot Carbon Co., *supra.*

According to labor relations law, "if the organization **has as a purpose the representation of employees,** it meets the statutory definition of 'employee representation committee or plan' under Section 2(5) and will constitute a labor organization if it also meet the criteria of employee participation and dealing with conditions of work or other statutory subjects." Electromation Inc., 309 NLRB 990, 994 (1992). (Emphasis provided)

Under such statutory definition, the Stewards' committee constitutes a labor organization based on the following: (1) it is composed of former CCPRB employees, who solicited and obtained the participation of other CCPRB employees[10]; (2) its purpose was to "deal" directly with CCPRB in regards to specific matters; (3) it "dealt" with CCPRB by implementing a strike regarding grievances, labor disputes, and bargaining negotiations. *See*, Electromation, Inc.v NLRB, 35 F.3d 1148, 1157 (7th Cir. 1994).

Because the Shop Stewards acted as a labor organization within the meaning of the NRLA since early October 2008, and continuously thereafter,[11] their action of calling the October 20-22 strike requiring CCPRB to reinstate them and to sit and bargain with them, was illegal.

Undisputed evidence shows that the October 20-22 strike was not a spontaneous action of the CCPRB employees. The strike was strategically planned and coordinated by the Shop Stewards who acted in representation of several CCPRB employees, and who continuously demanded, during the three days of the strike that CCPRB bargain with them. The Shop Stewards engaged in, and induced

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[10] General Counsel's witnesses testified that CCPRB's employees participated in the October 12 and 19 meetings. More specifically, more than 80 employees attended the October 12 meeting (GC Exh. 29 (a) and (b)); and, more than 50 employees attended the October 19 meeting (Tr. 421, ln. 11-12, Carlos Rivera)

[11] During these adjudicative proceedings, two of the Stewards acted as "representatives" of the alleged discriminatees in the all CA cases, i.e., Miguel Colon and Carlos "Charlie" Rivera.

and encouraged CCPRB employees to participate in the October 20-22 strike to force CCPRB to reinstate them and to continue the bargaining negotiations with only them, notwithstanding the fact that there was another labor organization (the Union) which was the Section 9 exclusive bargaining representative of CCPRB's employees, and that CCPRB and the Union had already agreed to return to the bargaining table.

By striking with the purpose of forcing CCPRB to bargain with them as the bargaining representative of its employees at a time when the Union was the certified representative of those employees, the Shop Stewards engaged in an unfair labor practice vesting the strike of illegal motives that resulted in the striking employees' loss of the protection of the Act. The ALJ failed in not finding that the Shop Stewards acted as a labor organization and in not finding that the actions of the Shop Stewards were unlawful.

D. THE "LAST CHANCE AGREEMENT" WAS VALID AND, EVEN IF NOT, IT BEARS NO RELATION TO THE DECISION TO DISCHARGE LUIS BERMÚDEZ, JOSÉ RIVERA, VIRGINIO CORREA AND LUIS MELÉNDEZ.

In its decision, the ALJ concluded that (1) the terms of the last chance agreement are overly broad and, thus, unlawful under the NLRA (ALJD p. 25, lines 27-28), that CCPRB violated Sections 8(a)(1) and (4) of the NLRA by discharging employees Luis Bermúdez, José Rivera-Barreto, Virginio Correa, and Luis Meléndez, since the execution of the last chance agreement preceded the four employees' termination (ALJD p. 26, lines 11-14) and that CCPRB violated Section 8(a)(1) and (3) of the Act "because the discharges were directly related to the four employees' participation in the unfair labor practice strike, and but for that action, the employees would not have executed the last chance agreement" (ALJD p. 26, fn.

41). As will be discussed below, the ALJ erred in making these findings and conclusions.

After the October 20-22 strike ended, CCPRB suspended 52 employees. (Stipulation of Exhibits and Facts No. 6; Paragraph 2, Joint Exhibit 7) Later, the Union requested reconsideration of the suspensions and bargained with CCPRB the execution of "Stipulation and Agreements" or "last chance agreements."[12] Pursuant to the terms agreed by the parties, the employees and the Union accepted the disciplinary measure for the employees' participation in the October 20-22 strike and CCPRB agreed to reduce the suspension period of the employees. (Paragraph 4 and 4(a) and (b) of the Joint Exhibit 7) On October 30, 2008 CCPRB contacted each of the suspended employees and informed each of them that he had the opportunity, if he chose to do so, to return to work before the suspension was over by signing an agreement among CCPRB, the Union and the employee.

The agreement contains the following clauses:

> Paragraph 4 (b) - The Company is committed to reinstating the Employee once the sanction has been fulfilled and immediately following the signature of this agreement, as long as the Employee makes the commitment not to present any action or claim against the Company or the Union **for the facts that led to his/her suspension**, including but not limited to the violation of the right to strike, organize, associate, or any other disposition related to Section 301 of the Labor Management Relations Act, or local laws and/or for the lack of adequate representation from the Union, salary unearned and/or non compliance with the Collective Bargaining Agreement. (Emphasis provided)
>
> Paragraph 7 – The Employee agrees that he/she will not testify or offer evidence against the Company or the Union before any court, administrative agency or hearing, or at any local or federal forum, except in the case he/she is subpoenaed to do so by an appropriate court or authority.

[12] Specifically, paragraph 4 of the "Stipulation and Agreement" states:

> 4. The Employee has requested through the Union the reconsideration of the disciplinary measures to be imposed, and the Company has accepted said Request, subject to the following conditions:
> (Joint Exhibit 7)

The ALJ found that these clauses violated the NLRA and, thus, concluded that the agreement was not valid. The ALJ erred.

The Board has a long-standing policy of encouraging the peaceful, non litigious resolution of disputes. Independent Stave Company, Inc., 278 N.L.R.B. 740, 741 (1987). The purpose of such attempted settlements has been to end labor disputes and, if possible, to extinguish all the elements giving rise to them. Id., quoting Wallace Corp. v. N.L.R.B., 323 U.S. 248, 253-254 (1944). On a number of occasions, the Board has reiterated its commitment to private negotiated settlement agreements and its policy of encouraging parties to resolve disputes without resort to Board processes. See: Independent Stave Company, Inc., *supra*; Combustion Engineering, 172 N.L.R.B. 215 (1984).

It is generally accepted that "last chance agreements" may serve useful purposes for employers, Unions, and employees to promote the settlement of disputes. Transit Management of Southeast Louisiana, Inc., 1995 N.L.R.B. LEXIS 969 (1995). The validity of the "last chance agreements" depends, among other considerations, on the scope of the agreement. The Board has concluded that, under certain circumstances, waivers of Section 7 rights are valid under and not repugnant to the Act. In fact, this conclusion has been reached many times over the years. See e.g. U.S. Postal Service, 234 NLRB 820 (1978); Coca-Cola Bottling Company of LA, 243 NLRB 501 (1979).

In the case at hand, the terms of the "Stipulation and Agreement" are not prohibited by the Act, nor do they constitute a condition of employment to discourage membership in any labor organization. The "Stipulation and Agreement" was simply an agreement between CCPRB, the Union and the employees to settle the dispute as to the disciplinary measure imposed on the employees for their participation in the

October 20-22 illegal strike. It was the result of a negotiation during which each of the parties made concessions. The employees received a reduction in the discipline originally assessed against them and were allowed to return to work, thus, shortening the suspension period. On the other hand, CCPRB obtained a final settlement as to the suspension of the employees and the Union complied with its duty of fair representation without having to litigate the matter. Furthermore, the agreement was signed freely and voluntarily.

The Stipulation and Agreement signed by CCPRB's employees was limited and directly related to the suspension that occurred as a result of the October 20-22 incidents. The agreement **only** precluded the employee from presenting any action or claims against the Company or the Union for the facts that led to his/her suspension. It did not extend or apply to the right of the employee to file unfair labor practice charges against the Company for other matters that might arise in the future or even to prior claims of unfair labor practice charges filed by the employee for other facts not related to the October suspension. Said limitation was expressly included in paragraph 4(b) of the agreement. Additionally, the agreement did not require the employee to refrain from engaging in concerted activities nor relinquish the right to choose his/her own Union representatives and/or hold Union office.

In sum, the Agreement signed by CCPRB's employees was absolutely valid. Moreover, since it was signed to resolve the dispute with employees, the Agreement is an encouraged act by the Board's own case law.

In direct opposition to established Board case law, the ALJ found invalid the agreement. Specifically, the ALJ concluded that Paragraphs 4(b) and 7 "are overly broad and are unlawful under the Act." (ALJD p. 25, ln. 26-27). According to the ALJ's interpretation, Paragraph 7 of the Agreement would prohibit the suspended

employees from filing future actions or giving testimony before the Board. In making this conclusion, the ALJ ignored well-established legal principles governing interpretation of contracts.

It is well-established that agreements must be interpreted in the light of all the circumstances that surround them. Restatement 2d, Contracts §202. If the principal purpose of the parties is ascertainable, it must be given great weight. Id. Furthermore, contracts must be interpreted as a whole, and all their clauses must be interpreted together. *Id.*

The Board has applied the preceding legal principles when interpreting "last chance agreements". In First National Supermarkets, Inc., 302 N.L.R.B. 727 (1991), the Board acknowledged that the **context** in which a "last chance agreement" is signed must be taken into account when interpreting the document. In that instance, an employee, Hoopes, was discharged from his position as a driver. The employee filed several grievances and an unfair labor practice charge related to his discharge and 4 weeks of vacation pay allegedly owed to him. First National Supermarkets offered to settle the grievance by paying Hoopes 3 weeks of vacation pay if he would sign a release. The release provided that Hoopes, in exchange for the vacation pay, would release the Union "from any and all grievances, complaints, charges, and/or claims of any kind which are now pending or which could be filed in the future relating to or arising of my total employment and my termination...."

The Administrative Law Judge ruled that the release was unlawfully broad because it prohibited the filing by Hoopes of any future unfair labor practice charges regarding future labor disputes. The Board reversed the ALJ's decision because it ignored "the context in which releases are generally negotiated". Citing Restatement 2d, Contracts §202, the Board held:

> While the phrase "total employment" may appear ambiguous in isolation, we think its meaning becomes **evident when examined in the context of the release itself, as well as the circumstances surrounding Hoopes' discharge.** The release was proffered to Hoopes after a lengthy dispute commencing with his discharge, which was the subject of grievance and arbitration proceedings as well as an unfair labor practice charge, followed by Hoopes' claim that he was owed vacation pay. In this context, it seems evident that the release referred to these claims and any others Hoopes might raise relating to his "total employment" with the Respondent through to his discharge. We therefore construe the phrase "total employment" narrowly and find that it is limited to Hoopes' past employment with the Respondent until his discharge in January 1988. See Coca-Cola Bottling of Los Angeles, supra (Board implicitly interpreted a release providing "that no actions of any kind will ensue" narrowly based on the entire document and the surrounding circumstances). First National Supermarkets, Inc., *supra.*

The Board has also followed the above-mentioned principles when interpreting waivers of Section 7 rights under collective bargaining agreements. In this respect, the Board has held:

> In contract interpretation matters, the parties' intentunderlying the language of the contract is always paramount. The principle was recently reaffirmed in Indianapolis Power & Light, 291 NLRB No. 145, slip op. at 6-7 (Dec. 9, 1988), where the Board found that "[i]n deciding the issue of whether sympathy strikes fall within a no-strike provision's scope, the parties' actual intent is to be given controlling weight. . . ." To determine that intent, the Board will look to both the contract language and relevant extrinsic evidence such as bargaining history. Lear Siegler, Inc., 293 NLRB 446, 447 (1989), citing Indianapolis Power & Light, 291 NLRB 1039 (1988).

The ALJ's conclusion that that the "Stipulation and Agreement" violates the Act because paragraph 7 precludes employees from filing unfair labor practice charges and/or giving testimony to the Board is incorrect because it interprets paragraph 7 in isolation, without any reference to the rest of the agreement or the context in which it was signed.

The "Stipulation and Agreement" was negotiated to settle the dispute regarding the disciplinary measure imposed on the employees by CCPRB on October 23, 2008. It has been undisputedly established that the parties in the "Stipulation and Agreement" limited the employees' waiver as to the filing of claims

against the Company **only for the facts that led to their suspensions on October 23.** The terms agreed by the parties in paragraph 7 of the "Stipulation and Agreement" precluded the employees from testifying or offering evidence against CCPRB or the Union, but only concerning specific matters related to their suspension, nothing else; with the valid exception that the employees are subpoenaed to testify by an appropriate court or authority. There is nothing in the record that suggests that, by signing the agreement, the parties intended to waive any future rights.

A reasonable interpretation of the "Stipulation and Agreement" as a whole, taking into account the context in which it was negotiated and signed, **can only lead to the conclusion that paragraph 7 only applies to the presentation of evidence regarding the employees' suspension.** However, even in relation to the facts that led to their suspension, CCPRB recognized the right of the employees to testify and/or offer evidence if subpoenaed by the Board. In addition, paragraph 7 does not preclude the employee from testifying or offering evidence against CCPRB in relation to any other grievance that may arise; nor does it preclude the employees from assisting other employees or the Board with regard to any matter arising under the Act. In the same manner, it does not prohibit the employees from disclosing to the Board any information with regard to any investigation or proceeding.

In this case, the Board must give great weight to the parties' principal purpose behind the signing of the "Stipulation and Agreement". This was to settle the grievance regarding the employees' October 23, 2008 suspension, nothing else. The ALJ's interpretation of paragraph 7 as a total prohibition from testifying and/or offering evidence to the Board is beyond the scope of the limitations intended and established by the parties.

As to Paragraph 4(b), the ALJ concluded that the language included in said paragraph restricts employees in the exercise of Section 7 rights because, for example, the employees would be prohibited from engaging in a lawful action against the Employer or filing actions against the Employer under the parties' collective bargaining agreement. (ALJD p. 25, ln. 35 to p. 26, ln. 2). This conclusion is based on a misreading of Paragraph 4(b). Said paragraph states:

> The Company is committed to reinstating the Employee once the sanction has been fulfilled and immediately following the signature of this agreement, as long as the Employee makes the commitment not to present any action or claim against the Company or the Union **for the facts that led to his/her suspension**, including but not limited to the violation of the right to strike, organize, associate, or any other disposition related to Section 301 of the Labor Management Relations Act, or local laws and/or for the lack of adequate representation from the Union, salary unearned and/or non compliance with the Collective Bargaining Agreement. (Emphasis provided)

Contrary to the ALJ's conclusion, Paragraph 4(b) is clear in its scope. The employee agrees not to strike, organize, associate or present any actions only "for the facts that led to his/her suspension." For these same reasons, there is no basis to conclude that CCPRB coerced employees Bermúdez, Rivera, Correa and Meléndez into signing an agreement that conditioned their reinstatement on the relinquishment of their Section 7 rights. Thus, the ALJ erred.

The ALJ also concluded that the discharge of these four employees violated the NLRA because it was directly related to their participation in the October 20-22 strike, and but for that action, the employees would not have executed the "last chance agreements". (ALJD p. 26, fn. 41). This conclusion is completely unsupported by the evidence.

There is no doubt as to the fact that the General Counsel bears the burden of proof in unfair labor practices cases. 29 U.S.C. § 160(c) (stating that since violations of the Act can be adjudicated only "upon the preponderance of the testimony taken" by the NLRB); *see also* Section 7(c) of the Administrative Procedure Act, 5 U.S.C. §

556(d) ("Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."); Fluor Daniel, Inc., 332 F.3d 961 (6th Cir. 2003). The Board has noted that, in assessing whether a prima facie case has been presented, a judge must view the General Counsel's evidence in isolation, apart from a respondent's proffered defense. *See* Bali Blinds Midwest, 292 N.L.R.B. 243 (1989); Hillside Bus Corp., 262 NLRB 1254 (1982).

The determination of whether an employee's discharge violates section 8(a)(3) rests on the employer's motive. Foothill Sierra Pest Control, Inc., 350 NLRB 26, 29 (2007), *citing*, Wright Line, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981). The General Counsel bears the initial burden of showing, by a preponderance of the evidence, "that an employee's protected conduct was a substantial or motivating factor" for the employee's discharge. Holsum de Puerto Rico, Inc. v. NLRB, 456 F.3d 265 (1st Cir. 2006), *citing* NLRB v. Transp. Management Corp., 462 US 393, 401 (1983). The General Counsel must satisfy this burden by showing: (1) the existence of protected activity; (2) that the employer was aware of the employee's protected activity; (3) the employer's antipathy toward it; and (4) a causal link between the antipathy and the employer's adverse employment action. E.C. Waste, Inc. v. NLRB, 359 F.3d 36, 42 (1st Cir. 2004), *citing* Transp. Management, at 401-403.

In this case, the General Counsel did not present any evidence or testimony pertaining to the allegations included in paragraphs 18(b), 19(b), 20(b), 22(b) and 26 of the Complaint. Therefore, the General Counsel failed to comply with its burden of proof to establish a prima facie case of discrimination as to the discharge of Luis Bermúdez on November 6, 2008; José Rivera Barreto on November 13, 2008; Virginio Correa on December 10, 2008 and Luis Meléndez on January 9, 2009.

Therefore, Paragraphs 18(b), 19(b), 20(b), 22(b) and 26 of the Complaint, should be dismissed accordingly.

Furthermore, the General Counsel failed to present any evidence to prove a causal connection or relationship between the discharge of these four employees and their participation in the October 20-22 strike. The fact is that the four employees mentioned above were not discharged in connection with the October 20-22 strike. On the contrary, they were reinstated upon signing the "last chance agreement" described in paragraphs 14 and 15 of the Complaint, as were the rest of the employees who signed the document. Actually, all of the employees who were offered the "last chance agreement" signed it and returned to work. However, only the four employees mentioned above were subsequently discharged. These four employees were terminated for reasons not related to the October 20-22 strike or the signing of the "last chance agreement". The causes for their terminations have to do with subsequent separate events that occurred on different dates.

Since the General Counsel did not establish a prima facie case of discrimination, the burden of proof did not shift to the employer, and CCPRB was under no obligation to present evidence regarding the legitimate reasons behind the four employees' discharges. Because the General Counsel did not present any evidence to prove that the discharge of these four employees was connected in any way to the October 20-22 strike there is no evidence on the record to support the ALJ's conclusion.

V. CONCLUSION

For all the foregoing reasons, CCPRB respectfully requests that the Complaint, all amendments thereto, and all underlying charges be dismissed in their

entirety, that the Exceptions of CCPRB be granted and that the Decision of the ALJ be reversed to the extent that CCPRB has excepted thereto.

RESPECTUFULLY SUBMITTED.

In San Juan, Puerto Rico, this 14th day of June, 2010.

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We hereby certify that on this same date a true copy of this document was served upon the following:

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Dated at San Juan, Puerto Rico this 14th day of June, 2010.

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